Filed 11/25/08 In re D.J. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re D.J., a Person Coming Under the Juvenile Court Law.	B203542 (Los Angeles County Super. Ct. No. FJ40832)
THE PEOPLE, Plaintiff and Respondent, v. D.J., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Shep Zebberman, Referee. Affirmed as modified.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

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The juvenile court declared appellant D.J. a ward of the court on the ground that he unlawfully resisted a peace officer. He was placed home on probation with various conditions, including five days in juvenile hall. He contends: (1) Instead of declaring wardship, the juvenile court should have granted him probation supervision without wardship pursuant to Welfare and Institutions Code section 725, subdivision (a) (section 725(a)).[1] (2) This court must review the proceedings that were held pursuant to his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). (3) A probation condition that ordered him not to participate in gang activity is vague, overbroad, and violative of due process. (4) The court improperly fixed the maximum term of confinement.

We modify the probation condition in question and otherwise affirm.

FACTS

The two witnesses at the adjudication hearing were Maria Antonia Borges, who was the principal of appellant's middle school, and Officer Marlon Esquivel of the Los Angeles School Police Department.

Around 9:00 a.m. on February 23, 2007, Borges observed, from a distance, that appellant was hitting a girl on the legs with his belt while girls were screaming, "No, no, no." As Borges approached appellant, he stopped using the belt. She asked him for it. He refused to give it to her and moved away from her. His demeanor was hostile, angry, and defiant. She asked him several times to accompany her to the dean's office. He refused. Then, he said he would give her the belt, but he would not go with her to the dean's office.

In her 30 years with the school district, Borges had not previously encountered such "open resistance" to an instruction from a school authority figure. She called on her radio for the school police.

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[1] Subsequent undesignated code references are to the Welfare and Institutions Code unless otherwise indicated.

Officer Esquivel arrived in uniform. He talked with Borges and then asked appellant why he refused to go to the dean's office. Glaring at Borges, appellant defiantly complained that he should not have to go to the dean's office, as he had only been "horseplaying" when he slapped the girl with his belt. Esquivel tried to calm appellant down, but he continued to refuse to go to the dean's office. Esquivel lightly grabbed appellant's shoulder, touching his shirt. Appellant swung his arm away and freed himself. He said something like, "Don't touch me, I'm not going to go anywhere." Esquivel insisted that appellant accompany him to the dean's office. When he tried to grab appellant again, appellant started to run away. Esquivel chased him. A group of students was gathering. Appellant turned around, looked angrily at Esquivel, and clenched his fists.

Officer Esquivel's partner had arrived by this time. He assisted Esquivel in wrestling appellant to the ground and placing him in handcuffs with his hands behind his back. Appellant struggled and kept his hands together at his chest, which made it difficult to handcuff him.

DISCUSSION

1. Denial of a Disposition Under Section 725(a)

Section 725(a) provides, in pertinent part: "If the court has found that the minor is a person described by Section . . . 602, . . . it may, without adjudging the minor a ward of the court, place the minor on probation, under the supervision of the probation officer, for a period not to exceed six months. . . . If the minor fails to comply with the conditions of probation imposed, the court may order and adjudge the minor to be a ward of the court."

Appellant contends that the juvenile court abused its discretion when it declared him a ward of the court and placed him home on probation instead of giving him a disposition pursuant to section 725(a), which is what the probation report recommended. He maintains that the court's decision was improperly based in part on punishing him for contesting the petition. If the record supported that argument, there

would be a serious problem under *In re Edy D.* (2004) 120 Cal.App.4th 1199, 1201 (*Edy D.*). There is nothing in the record to support it.

A. The Record

i. The Probation Report

Appellant was 14 years old and in eighth grade at the time of the incident. He lived with his mother and siblings. He had no previous arrests. He had once been suspended from another school for fighting. His school attendance was good. He had good grades in some subjects but was failing others. He did not use alcohol or drugs. He enjoyed math, science, basketball, swimming, and doing landscaping work for the city. He planned to become a basketball player after he graduated from high school. His mother said the members of the family had good communication skills, attended church, and went to family gatherings together. She further indicated that appellant came home on time, was respectful to her, and was very helpful around the house, although he was sometimes lazy about chores. He needed assistance with academic tutoring, but she did not think probation was necessary for him.

The probation report further indicated: "The minor stated that he is not in a gang however, some of his friends [with whom] he hangs around are in a gang. The mother indicated that the minor has never left and gone anywhere with . . . his friends that are in a gang, they always play in the neighborhood." The gang was the Broadway gang.

The report concluded that appellant needed to improve his performance in several school subjects, and there might be a need for family counseling, anger management, and parenting classes. The recommended disposition was supervision without wardship pursuant to section 725(a).

ii. The Disposition Hearing

After the juvenile court sustained the petition, it proceeded immediately to disposition. It said it had read the probation report.[2] It declared that the offense was a

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[2] We presume the court had not read the probation report before it decided whether the allegations in the petition were true.

misdemeanor with a maximum potential confinement time of one year. It verified that appellant was currently in school. It recognized that the probation report recommended a section 725(a) disposition but indicated it was inclined to place appellant home on probation with some time in juvenile hall, particularly since the report indicated that appellant spent time with members of the Broadway gang.

Defense counsel asked the juvenile court to follow the probation report's recommendation, particularly since appellant was not involved in gang or criminal activity, was attending school, was receiving tutoring, and was not a behavioral problem at home.

The prosecutor argued that the juvenile court's intended disposition was appropriate. During the course of his argument, the prosecutor stated: "I think this kid should not be rewarded with 725. If he had come to court and said, you know what, I did something wrong. You know, I should have said to the authority, yeah, all right, I messed up. I'll give you 725 for that. If you come in here and pretend like you didn't do anything, or you want to have your day in court, that's great, everyone is entitled to that, but he needs to be taught a lesson. He needs to be accountable for [his] conduct and [I'm] hoping if he gets home on probation at the very least, that his parents, and I'm assuming they're very active in his life, they'll be able to provide him some guidance and some structure."

Both of appellant's parents were in the courtroom. The juvenile court asked appellant's father if he had anything to say. The father asked how much time in custody the court was considering. The court said "until Sunday." The father then had nothing to say.

Defense counsel said he was troubled by the prosecutor's words about section 725(a). He understood those words to mean that if appellant "came in and just admitted that he did this and showed some contrition that he would have offered 725, but now that [the minor] is defiant in taking this case and saying he's not accepting responsibility, he's being punished for having this adjudication. There's no other way

to go around what those comments mean. He said that if he came in and admitted the charge, he'd get 725 and now that he had the adjudication, he's being punished for having the adjudication." Counsel further argued that nothing in appellant's previous behavior showed that he was an inappropriate candidate for a section 725(a) disposition.

The juvenile court reminded counsel that appellant had once been suspended from school for fighting, had been caught hitting a girl with a belt, was associating with gang members, and was defiant with the school principal and police officer. Counsel responded that there were neighborhoods in which people's childhood friends grew up to be gang members, but that did not mean appellant was involved with gang activity. Counsel stressed that there was no evidence that appellant hurt anyone, and his behavior with the belt sounded more like "horseplay." Counsel again complained that the prosecutor's words showed that appellant was being denied a section 725(a) disposition because he elected to have a trial.

The juvenile court responded, "I don't know if that's true or not either, but that's my view at this stage. I'm considering the evidence and the information in the report. And the arguments, and I don't think he's a good candidate for 725 at all." The court then declared appellant to be a ward of the court pursuant to section 602 and placed him home on probation with five days in juvenile hall.

B. Analysis

The prosecutor's words indicated that the *prosecutor* would not offer a section 725(a) disposition to a minor who contested the petition. The critical point is that it was for the juvenile court and not the prosecutor to decide the appropriate disposition, and the record does not show that the court rejected a section 725(a) disposition because appellant chose to contest the petition.

The situation was very different in *Edy D.*, *supra*, 120 Cal.App.4th 1199. The juvenile court there said, before the adjudication hearing, that the possibility of a section 725(a) disposition was "off the table" because the minor had rejected a section 725(a) disposition during previous discussions, which meant witnesses had been

inconvenienced by coming to court. (*Edy D.*, at p. 1201.) The court then heard evidence, sustained the allegations in the petition, made the minor a ward of the court and ordered him home on probation, even though the probation report recommended a section 725(a) disposition. *Edy D.* reversed the dispositional order, finding a violation of due process because the minor was punished for exercising his right to a trial.

Here, in contrast, the juvenile court's words do not show that it punished appellant for contesting the petition. The court said that a section 725(a) disposition was inappropriate due to "the evidence and the information in the [probation] report [a]nd the arguments . . . ." Taken in context, the court's words show that it knew it had the authority to make a section 725(a) disposition but decided not to do so based on everything it knew about appellant.

We therefore find no abuse of discretion in the juvenile court's refusal to give appellant a section 725(a) disposition.

2. The* Pitchess *Issue

A hearing pursuant to *Pitchess*, *supra*, 11 Cal.3d 531 was held on August 8, 2007. A representative of the Los Angeles Unified School District was present. In open court, the court ruled that it would limit disclosure to complaints of excessive force by Officer Esquivel in the preceding five years. Following an in camera hearing, the court denied the *Pitchess* motion on the ground there were no relevant records to be disclosed.

Appellant requests independent review of whether any discoverable material was improperly withheld. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) Respondent has no objection. As no transcript of the *Pitchess* proceedings existed, we augmented the record for it, on our own motion. Review of the augmented record shows that no discoverable material was withheld.

3. Probation Condition 15A

Appellant attacks probation condition 15A, which prohibits him from participating in "any type of gang activity." He contends that the condition is so vague

or overbroad that it provides inadequate notice of the prohibited conduct. As this is a pure question of law, it can be raised for the first time on appeal. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).)

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

The specific probation condition involved in *Sheena K.* forebade association with "anyone disapproved of by probation." The California Supreme Court rendered the condition constitutional by modifying it to preclude association with people the minor knew were disapproved of by the probation officer. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 891-892.) Here, consistently with *Sheena K.*, condition 15 was appropriately modified by the juvenile court to read: "Do not associate with anyone known to you to be disapproved of by your parents, or your probation officer[,] or [a] member of [a] criminal street gang, or [a] member of Broadway." A similar problem exists, however, with nonmodified condition 15A, which simply reads: "Do not participate in any type of gang activity." We find that, to provide adequate notice of what activity is prohibited, condition 15A must be modified to read: "Do not participate in any type of criminal street gang activity."

4. The Maximum Confinement Term

Appellant argues that, because the disposition order was for home on probation, the juvenile court had no authority to set the maximum term of confinement. The argument lacks merit because the disposition order included five days in juvenile hall and, pursuant to section 726, subdivision (c), the juvenile court must set the maximum term of physical confinement "[i]f the minor is removed from the physical custody of his or her parent," and "[p]hysical confinement" includes "placement in a juvenile hall."

In the reply brief, appellant relies on *In re Ali A.* (2006) 139 Cal.App.4th 569, 573. That case is inapposite, as the minor there was placed home on probation without any time in a juvenile hall.

DISPOSITION

Probation condition 15A is modified to read: "Do not participate in any type of criminal street gang activity." In all other respects, the judgment is affirmed.

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FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.